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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MURRY GUGGENHEIM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 313, 314:

> SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax * * * is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * *. (U. S. C., Title 26, Sec. 1131.)
>
> SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. * * * (U. S. C., Title 26, Sec. 1132.)

Regulations 67, promulgated under the Revenue Act of 1924 and relating to the Gift Tax under Title III, Part II, thereof:

> ARTICLE 1. *Transfers reached.* * * *
>
> The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

STATEMENT

On June 28, 1917, the respondent, a resident of New York, executed in New Jersey two trusts, one

for the benefit of his son (Ex. 2, R. 43–63) and one for the benefit of his daughter (Ex. 15, R. 125–144). The terms of each were much the same and provided that the trusts should continue for ten years, unless sooner terminated. (R. 46, 127.) The trustees were directed to pay annually to each beneficiary the income to the extent of $30,000 or such larger amount as the settlor at any time should provide. (R. 46–47, 127–128.) In each case it was provided that at the end of the ten-year period the trustees should turn over the principal and accumulated interest to the beneficiary, or, in case of his death, to his children; but if there should be no children surviving, then, in the case of the son's trust, to the settlor, and in the case of the daughter's trust, to the trustees of the son's trust, for the benefit of the latter. (R. 47–50, 128–131.) The settlor reserved to himself broad powers of control in respect of the trust property and its investment and administration. (R. 50–53, 131–135.) Among them was an unrestricted right to modify, alter, and revoke the trusts (Paragraph Eleventh of Exs. 2 and 15, R. 54–55, 136–137), and under it the settlor changed the terms of the trusts upon several occasions (Ex. 3, R. 64–68; Ex. 8, R. 74–89; Ex. 9, R. 90–99; Ex. 10, R. 100–105; Ex. 13, R. 109–118; Ex. 14, R. 118–124; Ex. 16, R. 145–149; Ex. 21, R. 155–169; Ex. 22, R. 169–178; Ex. 25, R. 182–191; Ex. 26, R. 191–196).

On July 13, 1925, the settlor modified the trusts by eliminating this power of revocation. (Ex. 14, R.

122; Ex. 26, R. 194.) The fair market value on that date of the securities constituting the corpus account in the trust for the son was $6,304,548.25, which amount included $61,644.63 representing interest accrued but not yet received and not reflected in the market quotations of the securities comprising the corpus account. The fair market value at that time of the corpus account of the daughter's trust was $6,805,915.19, which amount included $54,904.09 of such interest. (R. 35–36.)

The respondent filed with the Collector a gift tax return for the year 1925, but included therein no part of said amounts. (R. 36.) The petitioner determined that the whole thereof should have been included (Ex. 1, R. 37–43), and accordingly, on March 8, 1929, mailed to the respondent a notice of a deficiency in tax of $2,465,681.20 (R. 23–24).

Before the Board it was agreed that the amounts of interest accrued but not received, amounting together to $116,548.72, should be deducted from the total value of the corpus of the two trusts and the tax reduced accordingly. (R. 36.) Upon review by the Board the determination of the Commissioner was approved, except as modified by said reduction, and a decision entered that there is a deficiency of $2,436,544.02. (R. 221.) The whole of this amount is in issue.

The Circuit Court of Appeals reversed the decision of the Board. (R. 239.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the respondent's relinquishment of his power of revocation was not a transfer of property within Section 319 of the Revenue Act of 1924.

2. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. This case presents the question whether or not the principles laid down by this Court in respect of transfers of property at death are applicable to transfers of property during life. In *Chase National Bank* v. *United States*, 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, this Court held that for the purpose of taxing transfers at death a power of disposition represents a substantial right in the property subject to the power, and that regardless of technical considerations of title termination of that power by death constitutes a transfer of the property. In the instant case the Circuit Court of Appeals held that for the purpose of taxing gifts *inter vivos* termination of such a power does not constitute a transfer of property; transfer of title is necessary, the court said, and a power of disposition is not property or an interest in property, so that regardless of the substantial rights it may represent there is nothing which can pass upon its termination. The decision is thus apparently in conflict with the prin-

ciples laid down by this Court in what we believe are analogous, applicable, and controlling cases.

Though disclaiming any intention so to hold, the effect of the decision of the Circuit Court of Appeals nevertheless is to declare that Congress is without power to impose an excise as for a gift *inter vivos* upon termination of a power of revocation. A gift tax is an impost upon the exercise of a right incident to ownership (*Bromley* v. *McCaughn,* 280 U. S. 124, 136), and if, as the court below held, the gift in this case was consummated in 1917, when the trusts were created (R. 239), and the subsequent relinquishment of the power of revocation "did not transfer but rather extinguished something" and "could not transfer anything of property" (R. 235, 236), it is obvious that no matter how the statute might have been drawn it would have been ineffectual to impose a valid tax upon occurrence of the later event.

2. As a necessary corollary to its holding that no transfer of property took place upon the respondent's relinquishment of his power of revocation the Circuit Court of Appeals held that the gift took place in 1917, when the trusts were created. This conclusion is directly opposed to *Basket* v. *Hassell,* 107 U. S. 602, where it was said that there can be no valid gift *inter vivos* unless it "divest the owner of all present control and dominion over it, absolutely and irrevocably."

In holding that after the creation of the trust there was nothing capable of later transfer, the decision of the Circuit Court of Appeals is in apparent conflict with the principle of cases like *Poe* v. *Seaborn,* 282 U. S. 101, and *Corliss* v. *Bowers,* 281 U. S. 376, which state in respect of a donor of property who reserves a power of revocation that (*Poe* case, p. 116):

> While he has technically parted with title, yet he in fact retains ownership, and all its incidents.

3. The decision of the court below is directly in conflict with the decision of the Court of Claims in *Means* v. *United States,* 39 F. (2d) 748, certiorari denied, 282 U. S. 849. In that case, as in this, the creator of a trust relinquished the reserved right to revoke after the gift tax provisions of the Revenue Act of 1924 became effective. The Court of Claims held that the case was controlled by *Chase National Bank* v. *United States, supra,* and *Reinecke* v. *Northern Trust Co., supra.* It regarded those decisions as establishing that the freeing of the property from the possibility of the exercise of the right of revocation effected the transfer which was the subject of the tax, and said that the fact that in those cases death was the event that terminated the right was immaterial.

4. The consistent administrative construction of the Revenue Act involved is opposed to the decision

of the court below, and such construction has received implied legislative approval. It is believed that the question presented is of sufficient general importance to justify review by this Court.

Wherefore it is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Attorney General.

AUGUST, 1932.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 197–220) is reported in 24 B. T. A. 1181. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 233–239) is reported in 58 F. (2d) 188.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1932. (R. 239.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, specification of errors, a statement of the case, and the statutes and regulations involved will be found in the petition.

ARGUMENT

The question in this case is whether respondent's relinquishment of his power of revocation of the trusts was a transfer of property, either direct or indirect, and hence within Section 319 of the Revenue Act of 1924, *supra,* which imposed a tax "upon the transfer * * * by gift * * *

of any property * * *, whether made directly or indirectly." The Circuit Court of Appeals held that the relinquishment was not such a transfer, upon the ground that a transfer of property within the statute means a transfer of title and that since a power of revocation gives its holder no title its surrender is not a transfer of property, and on the further ground that the gift was made when the trusts were created, not when the settlor terminated his control over them.

This holding and the reasons adduced in support of it we believe are unsound and the result of a misinterpretation of and departure from applicable and controlling principles laid down by this Court in analogous cases.

In *Chase National Bank* v. *United States*, 278 U. S. 327, as in the case at bar, a tax was in terms imposed upon a transfer. The only difference is that in that case the transfer taxed was of net estate at death, which by the statute included certain described "miscellaneous items of property" (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348), while here it is of property without limitation. In both cases title to the property in question had "vested" in the donee or the trustee; all the donor retained was a power of disposition, which was described specifically in neither statute. The question in the *Chase* case (pp. 334–335), as here, was whether the termination of that power was a transfer. This Court held that it was, and in

consequence the tax was upheld against constitutional objections based (p. 329) upon the same reasoning advanced by the court in this case. Termination of the power, this Court said (p. 335), was "no less a transfer" of the property subject to it than a transfer effected in other ways. It cited *Saltonstall* v. *Saltonstall,* 276 U. S. 260, as authority for the proposition that the freeing of the property of the possibility of exercise of the power "effected a transfer," because, as said in that case (p. 271), it is "the shifting of the economic benefits and burdens of property" which is important, not the conveyance of technical title. Such a power while outstanding, the *Chase* case pointed out (pp. 336–337), left the gift incomplete as to both donor and donee, and not until its termination was transfer of the property complete. Termination, it was said (p. 339), operated "as an effective transfer."

If these things were true in the *Chase* case they would seem to be no less true here. In each an excise was laid upon the privilege of transferring property; in the one case at death, in the other during life. Had there been no transfer in the *Chase* case there could have been no tax. And the fact that there was a transfer there should be conclusive that there was one here; the principle is the same irrespective of the time of exercise of the privilege.

Like the *Chase* case so *Reinecke* v. *Northern Trust Co., supra,* involved the estate tax title of the

Revenue Act of 1921, c. 136, 42 Stat. 227. There again, as in the *Chase* and *Saltonstall* cases, this Court held that termination of a power of disposition, in this instance in the form of a power of revocation like that at bar, constituted a transfer of the property subject to the power, and a tax was thus upheld against constitutional objections based (p. 345) upon the fact that, as here, title had long since passed out of the donor.

These cases emphasize that the time of transfer of technical legal or equitable title, which the court below deemed controlling in the instant proceeding (R. 238), is not decisive. As this Court said in *Tyler* v. *United States,* 281 U. S. 497, 503, an estate tax case:

> The question * * * is, not whether there has been, in the *strict* sense of that word, a "transfer" of the property by the death of the decedent, * * * but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. (Italics ours.)

And this Court there held accordingly that termination by death of a tenancy by the entireties, though in a strict sense not a transfer of the property to the survivor, was such in substance, and upheld the tax against constitutional objections

based on the argument (p. 502) that "no right in such property is transferred by death, but the survivor retains only what he already had," which is in effect the theory upon which the court below decided this case.

If, viewed in its substance, there was a transfer of property in the *Tyler* case when one tenant died there was no less a transfer here when the taxpayer relinquished his power of disposition. In the former the survivor's rights were in no way subject to control or diminution at the hands of the decedent, while at bar the taxpayer had an interest great enough to permit him to revest title in himself and which this Court has said is the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

In the *Corliss* case the taxpayer had a power of revocation similar to that of the taxpayer here. He argued that he was not subject to tax upon income from the trust property because (p. 378)—

> The legal estate was in the trustee and the equitable interest in the wife,

and that therefore he had no interest in the property. But this Court answered (p. 378) that—

> taxation is not so much concerned with the refinements of title as it is with the actual command over the property,

and that "from the point of view of taxation there would be no difference" whether or not the taxpayer in a strict sense had title.

> The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

So long as he retained his power of control the respondent at bar was taxable upon the trust income, because that power made him owner of the corpus. *Corliss* and *Poe* cases, *supra*. See *Hoeper* v. *Tax Commission*, 284 U. S. 206; *Burnet* v. *Leininger*, 285 U. S. 136, 142. When he relinquished his right of control and rid himself of the ensuing liability, what he did was to take ownership out of himself and place it in another, which was in the fullest sense a transfer of property and therefore within the statute.

There is no good reason for supposing that the word "transfer" was used in the statute involved in this case in a sense any narrower than that in which it was used in the estate tax provision involved in the *Chase* and *Reinecke* cases. On the contrary every intendment should be indulged in favor of a like meaning; for the two kinds of taxes were merely parts of a single coherent taxing scheme, the gift tax being "adopted into the Revenue Act of 1924 as correlative to the estate tax." (S. R. No. 52, 69th Cong., 1st Sess., p. 9.)[1] What is a transfer

[1] The reports of the Committee on Ways and Means of the House and the Committee on Finance of the Senate in respect of the gift tax provisions of the Revenue Act of 1932 give further support to the view that the word "transfer" in the 1924 Act should not be used in the sense of referring only to the conveyance of technical legal or equitable title. Though subdivision (c) of Section 501 of the 1932 Act specifically covers, among other things, situations like that at

for purposes of the one would seem to be no less a transfer for purposes of the other.[2]

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bar, it was not a part of the Bill at the time these committee reports were submitted, but was added subsequently by amendment from the floor of the Senate. (Cong. Rec., 72d Cong., 1st Sess., Vol. 75, No. 137, p. 12015.) So what the committees said in respect of the meaning of the word "transfer" in subdivisions (a) and (b), which in substance are the same as Section 319 of the 1924 Act, is strongly indicative of its proper meaning here. They said (H. R. No. 708, 72d Cong., 1st Sess., pp. 27–28; S. R. No. 665, 72d Cong., 1st Sess., pp. 39–40):

"The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions (subject to certain express conditions and limitations) whereby, and to the extent (sec. 503) that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, * * * (7) where A creates a revocable trust naming B as beneficiary, a gift to B of the corpus is effected when A relinquishes the power to revoke or the power is otherwise terminated in B's favor (the income payments to B in the interim being gifts from A in the calendar years when received)."

It is probable that subdivision (c), in so far as it deals with situations like that involved here, was declaratory and was specifically intended to overcome the effect of the decision in this case, opinion in which was rendered on May 2, 1932. (R. 233.) Subdivision (c) was offered and adopted May 31, 1932. (Cong. Rec., *supra*.) Congress had intended, the committee reports show, that subdivisions (a) and (b) should apply to termination of a power of revocation, as had been declared by the regulations and by the Court of Claims in *Means* v. *United States*, *supra*, in respect of Section 319 of the 1924 Act.

[2] Any other view would, as this case illustrates, result largely in defeat of the purpose of the gift tax in cases of

This was the interpretation placed by the Commissioner upon the statute here involved at the time of its enactment (Article 1 of Regulations 67, *supra*), before the respondent relinquished his power of revocation. Furthermore, with this interpretation before it, Congress, for the purpose of reducing the tax rate, reenacted Section 319 as Section 324 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 86, without any change of language. This is evidence of legislative approval of the interpretation made. *Brewster* v. *Gage,* 280 U. S. 327, 337; *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235.

Means v. *United States* (C. Cls.), 39 F. (2d) 748, certiorari denied, 282 U. S. 849, which involved the same question as this case under substantially similar facts, is in direct conflict with the decision below. The principles laid down in the *Chase, Reinecke,* and *Saltonstall* cases were deemed controlling. The court said (p. 753):

> In these cases the precise question determined by the court was the effective date, within the meaning of the taxing statutes, of the transfer of property where the donor in trust instruments had reserved to himself the unrestricted rights of revocation.
>
> The court held in each case that the transfer was made when the possibility of the exercise of the rights of revocation ceased to

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trusts created before the 1924 Act, which was to prevent evasion of the estate tax by distributions during life. See *Tyler* case, *supra*, p. 505.

exist; that until that time the gift was incomplete both to the donor and to the donee.

United States v. *Field,* 255 U. S. 257, upon which the court below largely relied (R. 238), is not in point. There the estate upon the transfer of which the tax was laid was limited by the statute to property falling within either of two specified classes. And since the property over which the decedent had and exercised a power of appointment did not fall within either class it of course followed that it was not for that purpose part of the decedent's estate. Simple lack of ownership of the property by the decedent was not the ground of the decision, but rather lack of ownership because prescribed as a requisite by the statute.

The court below also attached significance to the fact that in the 1924 Act, trusts subject to powers of revocation were for the first time specifically mentioned in the estate tax provisions (Sec. 302 (d)), while that was not done in the gift tax title, and concluded therefrom that Congress intended that the two should be treated differently. (R. 235.) The inference is not a tenable one. The death duty was imposed upon the net *estate* (gross estate less deductions), and it was of course necessary for purposes of measuring the tax (*Tyler* case, *supra,* pp. 504–505) to prescribe what should be included in the estate. Cf. *Northern Trust Co.* case, *supra,* p. 348. But the gift tax was laid upon the transfer of *property,* and in that situation

there was of course no similar necessity for definition. In any event, Section 302 (d), so far as here important, merely clarified the law, or, more exactly, duplicated the preceding subdivision (c). This latter provision was like Section 402 (c) of the 1921 Act, which, though it did not in terms cover termination of a power of revocation, nevertheless applied to such an act. *Reinecke* case, *supra.* So Section 302 would have reached a termination of a right of control without the aid of subdivision (d).[3]

The opinion of the court below closes with the statement that the transfer by gift in this case was made in 1917, when the taxpayer created the trusts.[4] This conclusion is of itself, we submit, strongly indicative that the court's decision is erroneous. Section 319 taxed property passing by gift *inter vivos,* and it is well established both in this and other Federal courts, as well as in the courts of New York, where the taxpayer resided, and of New Jersey, where the trust agreements were executed, that until all dominion and control over the

[3] It has been held that Section 219 (g) of the 1924 Act, likewise a new provision, but dealing with the taxation of the income of revocable trusts, was declaratory. *McCauley* v. *Commissioner* (C. C. A. 5th), 44 F. (2d) 919, 920; *Dickey* v. *Burnet*, 56 F. (2d) 917, 920 (C. C. A. 8th).

[4] This view is of course unavoidable under the court's theory; for the question presented, the court correctly said (R. 234), was "as to when there was an effective transfer by gift," and if the transfer did not take place in 1925, when the power of revocation was terminated, it must of course have taken place in 1917.

property given passes finally from the donor there can validly be no such gift. *Basket* v. *Hassell,* 107 U. S. 602, 614; *Bowen* v. *Kutzner,* 167 Fed. 281, 296–297 (C. C. A. 4th); *Copland* v. *Commissioner,* 41 F. (2d) 501, 504 (C. C. A. 7th); *Edson* v. *Lucas,* 40 F. (2d) 398, 404 (C. C. A. 8th); *Ridden* v. *Thrall,* 125 N. Y. 572, 579; *Curry* v. *Powers,* 70 N. Y. 212, 217; *In re Humphrey's Estate,* 181 N. Y. S. 169, 170; *In re Ogsbury's Estate,* 39 N. Y. S. 978; *Provident Institution for Savings* v. *Sisters of the Poor,* 87 N. J. Eq. 424, 429, affirmed as *Provident Institution for Savings* v. *Mead,* 88 N. J. Eq. 349; *Matthews* v. *Hoagland,* 48 N. J. Eq. 455, 485. It seems quite impossible properly to regard the transfer as having taken place at any other time than when the power of revocation was relinquished.

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous. It is in direct conflict with the decision of the Court of Claims in *Means* v. *United States,* 39 F. (2d) 748, certiorari denied, 282 U. S. 849. The decision of the court below appears also to be in conflict in principle with the decisions of this Court in *Chase National Bank* v. *United States,* 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, which are believed to be controlling in principle. It also appears to be contrary to certain other decisions of this Court referred to in the foregoing brief. The amount in-

volved in this case is very substantial, and it is believed that the question presented is of sufficient general importance to justify review by this Court. The petition for certiorari should be granted.

Respectfully submitted.

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